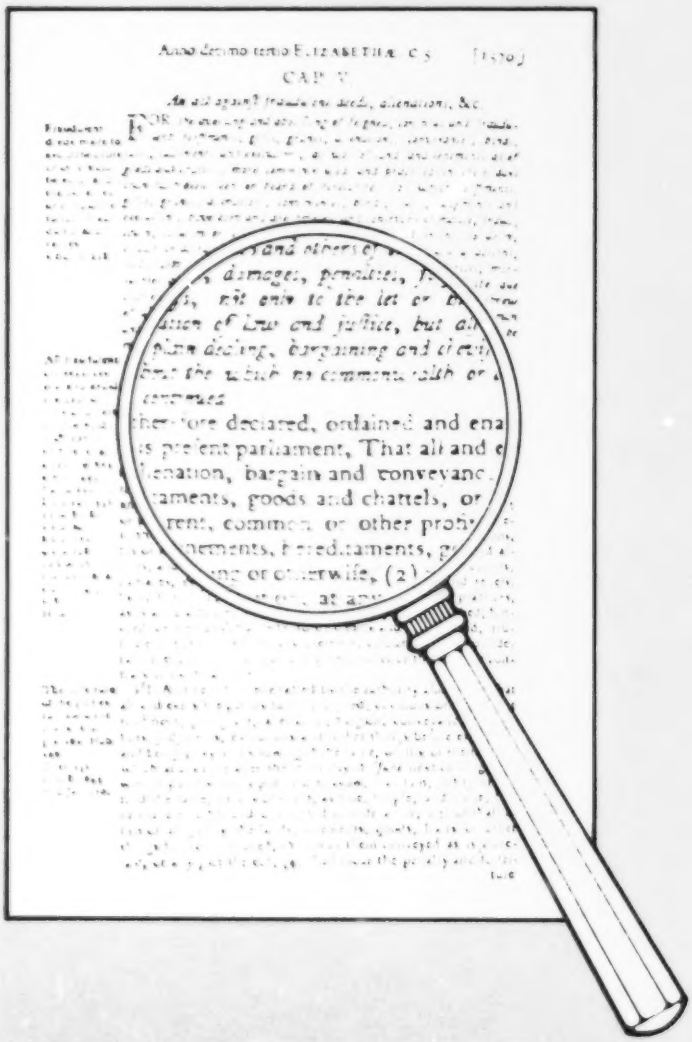
Law Reform
Commission of
Saskatchewan

Proposals Relating to Matrimonial Property Legislation

Report to the Minister of Justice

Saskatchewan



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PROPOSALS RELATING TO MATRIMONIAL PROPERTY LEGISLATION

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

Report to the Minister of Justice

October, 1985

The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission* proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

Professor DOUGLAS A. SCHMEISER, Q.C., B.A., LL.B., LL.M., S.J.D., Chairman

Madam Justice MARJORIE A. GERWING

Mr. GORDON J. KUSKI, Q.C., LL.B.

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Mr. Michael J.W. Finley, B.A., M.A., LL.B., and Mr. C. Peter Thagard, LL.B. are the Legal Research Officers, and Mr. Roderick J. Wood, LL.B., LL.M., Dip. in Legislative Drafting and Mrs. Sandy Antonini-Ready, LL.B. are Legal Research Officers under contract. The secretaries are Mrs. Sandra Ritchie and Miss Pat Harasymchuk.

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The Law Reform Commission Act.

> 6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law.

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Saskatchewan

Law Reform
Commission of
Saskatchewan

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The Honourable J. Gary Lane, Q.C.,
Minister of Justice,
Province of Saskatchewan,
REGINA, Saskatchewan.

Dear Mr. Minister:

In 1981, at the request of the then Attorney General, the Commission began a review of The Matrimonial Property Act. The Commission subsequently monitored decisions under the Act to identify problems in the application of the legislation. In addition, the Commission spoke to many individuals who had been directly affected by the new legislation, and undertook comparative studies of matrimonial property legislation in other jurisdictions.

Tentative Proposals for Reform of The Matrimonial Property Act were issued in October, 1984. The proposals included a draft Act. Public comment was invited, and the Commission met with interested organizations and individuals. The response indicated a wide spectrum of opinion, some of it endorsing the approach of the Tentative Proposals, some rejecting the proposition that any amendments to the legislation were appropriate at all, and some providing comments and criticisms regarding the proposals.

Perhaps unfortunately, a significant part of the discussion which followed publication of the Tentative Proposals focused on the interpretation of specific provisions in the draft Act rather than on the proposals themselves. The Matrimonial Property Act was a response to changing social values, particularly to the changing nature of the relationship between husbands and wives. Matrimonial property law involves basic questions of social policy. For that reason, the Commission has concluded that it can best contribute to the on-going discussion of matrimonial property law by attempting to identify basic principles which should inform and guide any change in the legislation.

A law reform commission must base its recommendations for reform primarily on an analysis of legislation and judicial decisions interpreting it. Although the Commission welcomes public discussion of its proposals, it is not the appropriate body to measure community opinion. Obviously, no change in the law is advisable unless it has a fair measure of public support. Before any change is made, political input, in the broadest sense, is required.

The Commission's final report sets forth the basic principles which it believes should be embodied in matrimonial property legislation. It hopes the report will provide the basis for further public consideration.

Pursuant to section 9 of The Law Reform Commission Act, the Commission submits its report entitled Proposals Relating to Matrimonial Property Legislation.

Respectfully submitted this 4th day of October, A.D. 1985.

Douglas A. Schmeiser, Q.C.,
Chairman

Madam Justice Marjorie A. Gerwing,
Commissioner

Gordon J. Kuski, Q.C.,
Commissioner

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PROPOSALS RELATING TO MATRIMONIAL PROPERTY LEGISLATION

I. INTRODUCTION

Matrimonial property law has been reformed in every Canadian province since 1978. The new legislation is premised on the notion that marriage is a partnership in which the spouses are entitled to share the property accumulated through their joint efforts during marriage.[1] The new legislation represents a retreat from the paternalism of the common law, and recognizes that child care and homemaking are contributions to the well-being of the family as significant as financial provision.[2]

The basic approach of recent matrimonial property legislation has been widely accepted by the public. But as Chief Justice Brian Dickson of the Supreme Court of Canada has pointed out, any simple statement about matrimonial property may be deceptive.[3] The statutory mechanisms adopted by the various provinces to achieve the goals of matrimonial property reform differ considerably in approach. It is likely that several approaches are workable, but none can be expected to be ideal. Matrimonial property legislation, like other law that deals with broad social policy issues, must be re-evaluated from time to time. Circumstances change, and lessons are learned from practical experience. The process of matrimonial property law reform did not end when matrimonial property statutes were in place in each of the provinces. It can be expected to continue in the future.

The Law Reform Commission of Saskatchewan was asked to begin its review of *The Matrimonial Property Act* soon after the Act was proclaimed. The Commission began monitoring decisions under the Act in an attempt to identify problem areas as they were revealed in cases before the courts. In addition, the Commission collected case histories, briefs and other comments from members of the public. Tentative Proposals were issued to facilitate further discussion. Since the Tentative Proposals were issued, the Commission has met with interested groups and individuals and participated in public meetings.

The Commission's review is part of the on-going process of discussion and reform. The Commission has concluded that this goal can best be served by identifying the principles which should underlie matrimonial property legislation. There can be no final answers to the policy issues involved in matrimonial property law. The legislation can — and should — be adjusted as circumstances change and experience requires. A clear conception of the principles of matrimonial property law is necessary to ensure that changes in the law further the basic goals of the law. The recommendations in this report are not cast in statutory form.[4] They can, however, be used as the basis for legislative action either in the context of the existing *Matrimonial Property Act* or in new legislation.

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[1] A succinct and influential statement of the basic goal of matrimonial property reform is contained in the *Report of the Royal Commission on the Status of Women*, Ottawa, 1970, 246.

[2] The immediate impetus for matrimonial property reform grew out of the reaction to the Supreme Court's decision in *Murdoch* v. *Murdoch*, [1975] 1 S.C.R. 423, in which it was held that the contribution of a farm wife to the operation and management of farm property owned by her husband created no proprietary interest in the property.

[3] "Matrimonial property" in *Family Law Dimensions of Justice*, (eds.) Rosalie S. Abella and Claire L'Heureux-Dubé, Toronto: Butterworths, 1983, 3.

[4] This report omits reference to several technical matters addressed in the Tentative Proposals. See the Tentative Proposals, for example, for discussion of conflict of laws rules, formal requirements in interspousal contracts and forms that might be prescribed by the Act.

II. THE BASIC PRINCIPLE: PARTNERSHIP AND EQUAL DIVISION

The nature of the family as a social and economic unit changes with the world around it . The contemporary focus is on the nuclear family, and within the family the spouses usually regard themselves as equal partners. Married people in Saskatchewan today expect to share both the obligations and the benefits of their joint undertaking. The common law applicable to matrimonial property disputes was unacceptable primarily because it was not based on a partnership notion. All Canadian matrimonial property legislation, on the other hand, now rests on the proposition that marriage is a partnership.

It must be recognized, however, that marriage is a relationship which cannot easily be compared with any other. Too close an analogy between marriage and commercial partnership should not be made. The challenge is to work out in a consistent and just manner the partnership notion in the context of the relationship between husband and wife. Canadian matrimonial property statutes attempt to meet this challenge in varying ways. It may well be, however, that some of the difficulties in matrimonial property legislation result from a failure to develop the partnership concept in a satisfactory manner.

Partnership implies a presumption of equal division of property acquired during marriage. A partnership is a co-operative arrangement in which the partners make the contributions expressly or tacitly agreed upon by them, and share the product of their joint undertaking. Section 20 of the Saskatchewan *Matrimonial Property Act* provides that:

> The purpose of this Act, and in particular of this Part, is to recognize that child care, household management and financial provision are the joint and mutual responsibilities of spouses and that inherent in the marital relationship there is joint contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities that entitles each spouse to an equal distribution of the matrimonial property, subject to the exceptions, exemptions and equitable considerations mentioned in this Act.[5]

The principle of equal division is contained in all matrimonial property legislation in Canada, although several jurisdictions apply it only to "family assets".[6] In the Commission's opinion, the presumption of equal division is a cornerstone of matrimonial property legislation.

In all the common law provinces, equal division is a presumption rather than an absolute rule. It is recognized that the circumstances of each marriage are different. For that reason, the courts must retain some discretion to depart from equal division in appropriate cases. Section 22 of the Saskatchewan Act sets out 17 factors which may be considered by the courts in determining whether to depart from the presumption of equal division.[7] Similar lists of factors are contained in other matrimonial property legislation. While this approach is both necessary and desirable, it is important to note that the discretion is not unlimited. Absent from the list of factors to be considered in dividing property under the Saskatchewan Act is any direct reference to the contributions of the spouses. The legislation does not permit the courts to place a relative value on the contribution of each spouse and weight the property division accordingly.[8]

In the Commission's opinion, dividing matrimonial property according to the relative contributions of the spouses would not be appropriate. Consider two hypothetical cases. In each

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[5] S.S. 1979, c. M-6.1.

[6] A distinction between family and business assets is made in British Columbia, Ontario, New Brunswick and Prince Edward Island. The distinction will be discussed in more detail below.

[7] A more restrictive approach to departure from equal division applies to the matrimonial home is discussed below.

[8] See *Howorko* v. *Howorko* (1981), 6 Sask. R. 420 (U.F.C.) and the comments of Mr. Justice McIntyre of the Supreme Court of Canada in *Farr* v. *Farr* (1984), 39 R.F.L. (2d) 1.

case, the spouses have agreed that one of them will be the family breadwinner, and that the other will maintain the home and take primary responsibility for looking after the children. Assume that in each case the allocation of responsibility is a fair one, and that in each case both spouses carry out their responsibilities adequately. However, the breadwinner in the first family earns $18,000 a year, while the breadwinner in the second family earns $36,000 a year. The contributions made by the homemaking spouse in both families are equal in value. But since the other spouse in the second family has contributed more than his or her counterpart, the relative contributions of the homemaking spouses are not equal. On a strict relative contribution test, an unequal division of property would be called for. Yet it is likely that most people would think that the homemaker spouse in each family should receive the same percentage share of matrimonial property. If the spouses have tacitly agreed that one of them has a responsibility for maintaining the home and caring for the children, while the other is to provide the family with financial security, it would seem fair to conclude that they contemplated sharing the property they have acquired equally.

In jurisdictions which apply the presumption of equal sharing only to family assets, the relative value of the direct contributions of the spouses to the acquisition and maintenance of other assets, including farms and businesses, is a relevant factor for the courts to consider. A distinction between family and other assets may have a superficial appeal. In practice, however, it poses many problems. In particular, the distinction is difficult to apply to family farms. In the Commission's opinion, the family assets concept would not be workable in Saskatchewan.

Recommendation 1

> Property acquired during marriage should be subject to equal division between spouses. The court should have a structured discretion to depart from equal division where it would be fair and equitable to do so, but the relative contributions of the spouses should not be a factor for the court to consider.

If there has been a wilful and nearly total failure on the part of one spouse to make the contribution to the relationship that it would be reasonable to expect in the circumstances of the marriage, the fundamental basis of the partnership has been eroded. In such a case, the spouse who fails to make any contribution to the marriage should no longer be able to rely on the partnership concept in order to obtain equal division of property. The issue in such a case is not the relative contributions of the spouses, but an abdication of responsibility inherent in a wilful and nearly total failure to contribute. Such a state of affairs can be taken into consideration in a matrimonial property division under the Saskatchewan Act. For example, in *Bernat* v. *Bernat* it was suggested that:

> [If] one spouse has abandoned his or her role in the marital relationship and has not made a contribution to the relationship, an argument for an unequal division of matrimonial property could be advanced .[9]

A similar approach has been adopted in some other decisions.[10]

In the Commission's opinion, it would be desirable to expressly include such a notion in the list of factors to be considered in dividing matrimonial property. Such a provision must be carefully worded, however, to ensure that it is applied only in appropriate cases. It would fail in its purpose if it permitted the weighing of the relative contribution of each spouse, or if it encouraged spouses to trade allegations about the failings of each other.

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[9] (1983), 26 Sask. R. 276 at 279 (Q.B.).

[10] See *Morrison* v. *Morrison* (1984), 29 Sask. R. 102 (U.F.C.), reversed (1985), 38 Sask. R. 92 in which the court was of the opinion that the facts did not disclose an extraordinary circumstance.

Recommendation 2

The court should have a discretion to depart from equal division of matrimonial property where there has been a wilful and nearly total refusal to contribute to the marriage, except where there is a reasonable excuse for the absence of contribution.

III. EXEMPTIONS

All Canadian matrimonial property legislation provides some exemption for property owned by each spouse at the date of marriage. Under the Saskatchewan Act, the property is exempt only to the extent of its fair market value at the date of marriage.[11] Under the Alberta *Matrimonial Property Act*, the increase in value after marriage is divisible, but there is no presumption of equal division.[12] In Ontario, matrimonial property other than family assets is divided on the basis of actual contribution; property acquired before marriage and any increase in its value during marriage is shareable only if it can be shown that the applicant spouse's effort contributed to the acquisition of the property or its increase in value.[13]

The basic question underlying exemption policy is one of determining when it is appropriate to attribute to the marriage partnership property acquired before marriage or any increase in its value. Ideally, the answer to that question depends on the nature of the marriage relationship. In other partnership arrangements, property owned by the partners as individuals before the partnership is formed usually remains outside the partnership. A law firm, for example, may have office space in a building owned by one of the partners; that fact does not make the building a partnership asset. But in some cases, a commercial partnership agreement may expressly provide for contribution of property by one of the partners. In fact, the basis for the partnership may be the capital provided by one partner and the skill provided by another. Marriage cannot be compared to either commercial model outlined above without some conceptual difficulty. Nevertheless, workable matrimonial property legislation should establish a basic rule — even if only as a rebuttable presumption — for division of increases in value of exempt property.

Between 1961 and 1981, the average value of farmland in Saskatchewan increased by almost 800 percent.[14] Perhaps for that reason, the exemption policy has been one of the most controversial aspects of the Saskatchewan Act. In 1980, the standard textbook on Canadian matrimonial property law noted that:

> In times of rampant inflation, unless the marriage is of extremely short duration, the exemption . . . may be insignificant, and the bulk of the property at its current value is subject to division . . . . [J]udicial discretion may be moved to temper the vagaries of the economy . . . .[15]

In a series of decisions, the Saskatchewan Court of Queen's Bench did attempt to modify the exemption policy contained in the Act by exercising judicial discretion. The court evolved the "capital base theory", which weighted division in favour of the spouse who brought assets into

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[11] Section 23.

[12] R.S.A. 1980, c. M-9, s. 7(3).

[13] R.S.O. 1980, c. 152, s. 8.

[14] *Statistics Canada Catalogue* #21-003, "Average Value of Farmland in Saskatchewan (including buildings) by Crop District, 1949-81".

[15] Alastair Bissett-Johnson and Winifred H. Holland, (eds.), *Matrimonial Property Law in Canada*, Carswell, 1980, S-54.

marriage. In *Farr* v. *Farr*, the Supreme Court of Canada concluded that such an approach could not be supported by the legislation.[16] That decision did not, however, lay to rest the question of what the exemption policy should be. Professor James McLeod, editor of the *Reports of Family Law*, immediately renewed the discussion when he described the Supreme Court's approach as "unfortunately narrow". He argued that the court had not addressed the major question of policy before it: whether an exemption policy which requires distribution of property not resulting from contribution of either spouse is acceptable.[17]

In the Commission's opinion, discussion of exemption policy should begin with a recognition of two principles. First, it should be recognized that all marriages cannot be forced into a single mold. In some cases, it may be appropriate to regard an increase in the value of certain types of property brought into marriage as a partnership asset, even if the increase has not resulted directly from the efforts of either spouse. On the other hand, some assets clearly do not come to be regarded by either spouse in any real sense as matrimonial property. Therefore, the courts must have a discretion in fixing the value of exemptions. Second, the discretion must be structured. This requires adoption of presumptions relating to property brought into marriage or increases in value, or guidelines for the division of such property.

For the most part, matrimonial property division is justified because each spouse assumes responsibilities during marriage. It is the property which the spouses have worked and saved to acquire during marriage which should be presumed to be subject to division. The Royal Commission on the Status of Women recommended that property "accumulated during marriage" be subject to division.[18] In the community property regimes in Quebec and most European countries, only property acquired during marriage becomes part of the "community". Property brought into marriage remains the "private property" of each spouse and both it and any increases in value remain outside the community of property.[19] In the Commission's opinion, unless there are significant factors requiring a departure from the general rule, property brought into marriage and any increase in its value during marriage should be exempt from division. But it should be stressed that such a rule can be no more than a presumption in the ordinary case. The circumstances of each marriage are different; they are too varied to be judged by a single, unalterable rule. Where the property brought into marriage requires little effort on the part of either spouse to maintain it, the presumption is strongest. If the joint efforts of the spouses have been expended in the operation of a farm or business brought into marriage, the presumption is weakened. In appropriate cases, it should disappear entirely. A stock portfolio which requires little attention apart from an occasional conference with a broker cannot be compared to a family farm.

Perhaps the best example of a case in which the exemption of the increase in value of property brought into marriage should be substantially reduced involves division of farm property following a long marriage. In the ordinary course both spouses will have maintained and improved the property, inevitably enhancing its value. If most of the property was brought into marriage by one spouse, there may have been reliance on the property by the other spouse: the contributions made by both spouses during the marriage may have been predicated on the notion that the property was "theirs". Even in the case of a marginal farm where there have been no net gains apart from the increase in the value of the property due to inflation or market forces during marriage, application of the presumption would not provide the non-property owning spouse with an adequate return for contribution to the farming operation over the years. The role adopted by the non-property owning spouse may also have been detrimental to that spouse's earning potential. In these long marriage

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[16] *Supra*, footnote 8.

[17] Annotation to *Farr* v. *Farr*, *ibid.*, 3.

[18] *Supra*, footnote 1.

[19] See *Matrimonial Property Law in Canada*, *supra*, footnote 15, at Q-1, ff.; and W. de Funiak and M. Vaughn, *Principles of Community Property*, 2nd ed., Tucson; The University of Arizona Press, 1971.

situations, the law should ensure that both parties share in the fruits of their labours.

In addition, even if the property has not increased in value, both spouses may have contributed to the preservation and maintenance of the property. A spouse who assumes the role of homemaker is contributing to the family farm, and may have assumed that role in reliance on the marriage partnership. In most farm marriages, both spouses will make direct contributions to the farming operation, but a farm wife should not be required to drive a tractor in order to be assured that her contribution to the joint undertaking of the spouses will entitle her to share in appreciation of the property. It would be appropriate in some cases to reduce the exemption on the basis of such contribution, even though it cannot be said that the contribution resulted in any increase in property value.

Recommendation 3

(1) The value of property owned by either spouse at the date of marriage should be exempt from distribution.

(2) Any increase in the value of property brought into marriage that results from an improvement to the property made by either spouse should ordinarily be subject to equal division between the spouses.

(3) Any increase in the value of property brought into marriage that is not the result of an improvement to the property should ordinarily be exempt from division, except in the case of a long marriage where both spouses have made a contribution to the maintenance, preservation, or management of the property. The court should have a discretion to increase or decrease the exemption in appropriate cases.

The application of the exemption policy to gifts and inheritances received during marriage requires special consideration. Under the Saskatchewan Act, gifts received during marriage are prima facie subject to division. In some decisions it has been held that gifts and inheritances should ordinarily be divided in the same fashion as other property acquired after marriage; in others it has been held that an unequal division can be ordered on the basis that a gift received after marriage results from "contribution . . . by a third party on behalf of a spouse", a factor enumerated in section 21. In the Commission's opinion, there should be a presumption that gifts and inheritances received during marriage are exempt. The Report of the Royal Commission on the Status of Women recommended equal sharing of assets acquired during marriage "otherwise than by gift or inheritance received by either spouse from outside sources".[20] If gifts and inheritances are ordinarily subject to division, the expectations of the person making the gift or leaving the inheritance may well be defeated. Such property should ordinarily be divided only if it is shown from the circumstances that it was intended for both spouses.

Recommendation 4

Gifts or inheritances received by a spouse during marriage should be presumed to be exempt from division. The presumption should be rebuttable, however, if it is shown that the gift or inheritance was intended for both spouses.

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[20] *Supra*, footnote 1.

IV. THE MATRIMONIAL HOME

Matrimonial property law in most jurisdictions accords a special status to the matrimonial home.[21] Special treatment of the matrimonial home is justified, as the Ontario Law Reform Commission has pointed out, because the matrimonial home is the "shelter and focal point of the family".[22] Under the Saskatchewan Act, the matrimonial home is given special treatment in three areas. First, section 22 of the Act creates a strong presumption in favour of equal division of the home. Departure from equal division is justified only if there is an exceptional circumstance, or if equal division would be unfair to the spouse who has custody of the children. Second, the matrimonial home is not exempt from distribution even if it was brought into marriage by one of the spouses. Third, Part I of the Act creates possessory rights in the matrimonial home which are enforceable even when no application for distribution of matrimonial property has been made. A spouse may apply for exclusive possession of the matrimonial home, and when such an order is made, the spouse who has title to the property is restrained from disposing of it.

A strong presumption in favour of division of the matrimonial home is appropriate. If there is any asset which the spouses are apt to regard as "theirs" without regard to the state of the title, it is the matrimonial home. If anything, the presumption should be strengthened. Departure from equal division to protect the possession of the spouse who has custody of the children is usually unnecessary. An exclusive possession order in favour of the custodial spouse until the children are able to leave home is probably more appropriate in most cases.

On the other hand, it is doubtful that spouses regard as completely irrelevant the circumstance that an unencumbered home was brought into marriage by one of them. For that reason, the Commission is of the opinion that a limited exemption should be available for the matrimonial home. The value of the home at the date of marriage, less the value of any mortgage or other encumbrance upon it, should ordinarily be exempt from division. Increases in the value of the home will be shareable under such an approach, whether the increase is due to market forces and inflation or to retirement of the mortgage during marriage.

Recommendation 5

> The matrimonial home should be given special status when matrimonial property is divided. Equal division of the home should be departed from only in exceptional circumstances, and when the home has been brought into marriage by one of the spouses the exemption should be limited to the value of the home at the date of marriage, less the value of any encumbrance on it.

Possessory rights in the matrimonial home have long been recognized in Saskatchewan. Under *The Homesteads Act*, the homestead (which is equivalent to the matrimonial home in most contexts) cannot be sold or encumbered by the owner-husband without the consent of his wife.[23] To some extent, the protection afforded by *The Homesteads Act* overlaps the protection afforded by Part I of *The Matrimonial Property Act*. It must be noted, however, that *The Homesteads Act* provides protection for wives, and not for husbands. The legislation is likely open to challenge under the *Canadian Charter of Rights and Freedoms*. In the Commission's opinion, *The Homesteads Act* should be repealed and replaced by a provision in matrimonial property legislation requiring the consent of both spouses to sale or encumbrance of the matrimonial home.

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[21] The special status may extend to household goods, as in the Saskatchewan Act, s.4. Those provinces which recognize a distinction between family assets and other matrimonial property attach some aspects of the special status to all family assets.

[22] *Report on Family Law, Part IV: Family Property Law*, Ontario Law Reform Commission, 1974, 131.

[23] R.S.S. 1978, c. H-5, s. 3.

Recommendation 6

The Homesteads Act should be repealed and replaced with a provision in matrimonial property legislation requiring consent of both spouses to sale or encumbrance of the matrimonial home.

Finally, the definition of matrimonial home requires further consideration. Under the Saskatchewan Act, matrimonial home is defined as including the quarter section upon which a home is located.[24] In addition, spouses may have more than one matrimonial home, since the definition includes any property owned by a spouse that has been used as the family home.

Inclusion of a quarter section of land in the definition is likely a carryover from *The Homesteads Act*, which attaches the consent requirement to the home quarter. Such an approach was appropriate in *The Homesteads Act*, which was primarily concerned with registration of instruments affecting title. The quarter section is a basic unit of land ownership in Saskatchewan. *The Matrimonial Property Act*, on the other hand, is broader in the scope of its concern. As the "focal point of the family", the matrimonial home should not include the farmland adjacent to the house. When matrimonial property is distributed, it is its value which is considered by the court. Standard methods of appraising rural property in Saskatchewan base the value of the farm home on replacement cost less depreciation. It is not necessary for valuation purposes to include the home quarter as part of the matrimonial home. In the Commission's opinion, the definition of matrimonial home contained in the Ontario legislation, which includes only the property reasonably necessary for the use and enjoyment of the home,[25] would be appropriate in Saskatchewan.

It may have appeared necessary to recognize more than one matrimonial home to deal with anomalous cases in which spouses have temporarily resided in a house other than the residence they regard as their home. Once again, *The Homesteads Act* seems to be the source of this approach. In the Commission's opinion, it is unnecessary to recognize more than one matrimonial home. Creditors' rights may be adversely affected if two homes are claimed. Special division rules should not apply to property which is not in fact the "focal point" of the family. The anomalous cases can be dealt with more effectively by recognizing as the matrimonial home the residence which the spouses themselves regarded as their principal place of cohabitation.

Recommendation 7

Matrimonial home should be defined as the residence the spouses regarded as their last principal place of cohabitation, and should include only that portion of the surrounding land that may reasonably be regarded as necessary for the use and enjoyment of the residence.

V. OTHER MATTERS

(i) *Date of Valuation*

In most provinces, matrimonial property is valued for division purposes on the date when spouses separate. When the spouses go their separate ways, the marriage partnership is over, and joint contribution ceases. The date of separation is, therefore, the logical date for determining the value of matrimonial property. The Saskatchewan Act, however, instructs the courts to value matrimonial property for division purposes either on the date of application or the date when the order distributing the property is made.[26] Such an approach may have been adopted because the

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[24] Section 2(g).

[25] *The Family Law Reform Act*, R.S.O. 1980, c. 152, s. 39(4).

[26] Section 2(l).

Saskatchewan legislation, unlike the legislation in other provinces, permits an application for division to be made while the spouses are still cohabiting.

It should be noted that whether date of separation or some later date is recognized as the time for valuation of property, some adjustments will be necessary in order to carry out a distribution of the property. The courts must distinguish between increases in the value of the matrimonial property that result from contributions made after separation (such as income earned from employment), and increases in the value of existing assets. An increase in value due to market forces or inflation after the date of separation should be shared. On the other hand, income earned from employment by a spouse between the date of separation and the date of the matrimonial property order should not be divided. Such adjustments are possible under the present Act because the length of separation is a factor to be considered in departing from equal division.[27] It does not appear, however, that sufficient attention is always directed to this factor in matrimonial property proceedings.[28].

In the Commission's opinion, the date of separation should ordinarily be the date for valuing matrimonial property when the spouses are no longer cohabiting. Such an approach would minimize, but not eliminate, the adjustments necessary to carry a division of property into practice in a distribution order.

Recommendation 8

Where spouses are not cohabiting when an application for division of matrimonial property is brought, the property should be valued for purposes of division as of the date of separation. The court should make appropriate adjustments to take into account the use of, benefit from, and any increase or decrease in the value of matrimonial property between the date of valuation and the date of the order.

(ii) *Deferred Distribution*

A matrimonial property division can have serious consequences for a spouse who uses the property to carry on a business or farming operation. A transfer of farm property, for example, can result in neither spouse having enough property left to carry on a viable operation. A large money judgment can cause a cashflow problem, or make it difficult for a farmer to raise operating capital.

It has been possible in some cases to reduce the economic impact of a distribution of matrimonial property without departing from the principle of equal division by deferring distribution in whole or in part. Several options are available under section 26 of *The Matrimonial Property Act*. For example, property can be vested in both spouses and possession of farming or business assets preserved for the spouse who requires the assets. More commonly, the spouse who intends to leave the farm or business has been awarded a share of the matrimonial property in the form of a mortgage on the property. As the mortgage is retired, the mortgagee receives his or her share of the property together with interest representing a share of the income from the property.

Deferral of distribution is not appropriate in most cases. The spouse leaving the farm or business may require considerable capital to re-establish himself or herself, and it must always be recognized that the non-property owning spouse has a right to share in the matrimonial property. Maintaining viability is not, in itself, a sufficient justification for deferring distribution of all or most of the matrimonial property for an unreasonable length of time. In the Commission's opinion,

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[27] Section 21(2)(c).

[28] It should also be noted that other adjustments in value may be required to carry out a distribution. For example, section 21(2)(j) permits the court to take the tax consequences of its order into consideration. As a matter of practice, tax consequences should always be considered, both in evaluating alternative distribution methods, and in valuing each spouse's share of property.

the court should be empowered to defer distribution to preserve a viable economic unit where it is essential to enable a spouse to earn a living. Where distribution is deferred, the other spouse should be compensated in a fair manner. The spouse whose share is deferred is, in essence, making an investment in the farm or business operated by the other spouse. The court should be satisfied that the investment is adequately protected and produces a reasonable rate of return, through interest payments or otherwise.

Recommendation 9

Where distribution of matrimonial property used for business or farming purposes would impair the viability of a business or farm and where the use of such property is essential to enable a spouse to earn a living, the court should have a discretion to defer distribution unless it would be unfair or impractical to do so. The court should structure the deferral in such a manner as to ensure that the spouse whose share is deferred is adequately compensated, through payment of interest or otherwise.

(iii) *Division and Distribution of Pensions*

The Saskatchewan *Matrimonial Property Act*, like matrimonial property legislation in all provinces except British Columbia, makes no express reference to pensions. Nevertheless, the courts have concluded that pension rights are ordinarily divisible matrimonial property.[29] It would be desirable to remove any remaining doubt that pensions are matrimonial property. However, the division of pension rights involves some difficult problems.

A variety of methods of valuing pension rights has been applied by the courts, with inconsistent results. In *Tataryn* v. *Tataryn*[30] the Saskatchewan Court of Appeal indicated a preference for valuation based on actuarial evidence. However, actuarial methods are designed primarily for statistical purposes, not for providing meaningful measures of the value of pension rights. As the Court of Appeal pointed out, actuarial evidence concerning a great number of factors and contingencies must be provided if this approach is adopted, and in the final analysis, the actuarial value must be adjusted by the court in the light of other evidence. Because of the complexity of actuarial evidence, its inherent weaknesses, and the cost of the actuarial analysis, other approaches have been favoured by many commentators.

A more straightforward alternative adopted by the courts in some cases is to divide contributions and accrued interest. But this approach is not without difficulty. If the valuation is based on combined employee and employer contributions, the non-employee spouse may be overcompensated unless some further adjustment is made. This approach is particularly unrealistic when the employer contributions are not "vested", or are vested but not "locked-in"; in these cases the employee may never receive any benefit from the employer contributions. Numerous other contingencies further complicate the picture, including the ultimate incidence of taxation when the pension matures, the possibility that the employee may terminate employment early and opt for a refund of contributions or die before the pension matures, and the simple fact that a cash sum in hand is worth more than a contingent right that can be realized only in the distant future.

In some cases pensions have been valued by taking into consideration only employee contributions and interest. This approach has been favoured in part because it appears to balance the factors and contingencies discussed above. It lends some certainty to an uncertain process; the inescapable fact about pensions is that employee contributions take money out of the family budget that would otherwise add to the family's standard of living or be used to acquire assets and

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[29] *Tataryn* v. *Tataryn* (1984), 38 R.F.L. (2d) 272 (Sask. C.A.).

[30] *Ibid.*

savings.[31] On the other hand, employee contributions in a fully funded plan is part of the total benefit package received by the employee; the employer contribution can be regarded as a benefit in lieu of additional salary or wages.

In the Commission's opinion, valuation of pensions based on employee contributions plus interest is probably the most workable approach presently available. It is not entirely satisfactory, however. Therefore, it cannot be recommended as a standard formula for valuation of all pension rights. Because pension plans differ widely at present, and contingencies hamper prediction of future pension benefits, it is impossible in many cases to do more than make an educated guess at the real value of pension rights. Unless pension law is substantially reformed, the courts should retain a broad discretion to determine the value of pension rights in individual cases.

The problem of developing equitable rules for division of pension rights would be simplified by adoption of pension regulations reducing the impact of contingencies and the variability of pension plans. The Provincial Superintendent of Pensions has informed the Commission that major amendments to *The Pension Benefits Act*[32] are being considered. If the Act is amended, it may be possible for the Superintendent of Pensions to provide tables and formulae for valuing vested interests in pension plans. Such tables would provide sound actuarial values for pensions which could be used upon the division of matrimonial property.

Recommendation 10

(1) Pension rights and benefits should be, by definition, matrimonial property.

(2) Because of the complexity of the problem of determining a fair and equitable valuation of pension rights for purposes of division within the context of existing pension plans and regulations, the court should retain a broad discretion to determine the value of pension rights in the context of individual cases. One useful method is to value the pension on the basis of employee contributions and interest during marriage.

(3) If amendments to *The Pension Benefits Act* reducing the variables that affect the valuation of pension rights are adopted, matrimonial property legislation should provide for valuation based on the actuarial values of pension rights calculated in accordance with the new pension regulations.

(iv) *Dissipation*

Matrimonial property legislation in all the common law provinces is based on the idea of deferred sharing. It leaves each spouse free to acquire, sell and encumber property, unless and until a court orders distribution of the matrimonial property. But extravagant spending of matrimonial property by one spouse could undermine the right of the other spouse to a fair share of the matrimonial property. For that reason, matrimonial property legislation allows a court to restrain a spouse from dissipating matrimonial property. The courts may also adjust the division of assets to take into account dissipation that has already occurred. Finally, if a spouse gives a substantial gift (including a sale for less than fair market value) to a third party, the property may be traced into the hands of the third party if the transferee knew or ought to have known that the gift was made with intent to defeat a matrimonial property claim.[33]

Dissipation provisions are a necessary part of matrimonial property legislation. In the Commission's opinion, however, it is possible to make some improvement in the provisions

[31] Some modification of this approach is obviously necessary in some cases. Some pension plans require no employee contributions. In other cases, the employer contributions significantly exceed the employee contributions. It should not be possible to shelter pension plans from division by increasing employer contributions and decreasing salary and employee contributions correspondingly. This problem can, however, be addressed by deeming part of the employer contributions to be employee contributions.

[32] R.S.S. 1978, c. P-6.

[33] Sections 21(2)(h) and (k), and 28.

contained in the present Act. First, dissipation is defined in the present Act as jeopardizing the financial security of a household by a squandering of property. The word "squandering" adds little to the definition. It is not clear whether it might include bona fide but ill-advised investment decisions. In addition, dissipation should not be confined to cases in which financial security is jeopardized. Dissipation is material to division even if sufficient assets remain to provide financial security. For that reason, it would be desirable to define dissipation as any extravagant or wasteful dealings with matrimonial property. Second, the definition of dissipation should make it clear that extravagance is not objectionable if both spouses consented to it. Third, the Act presently contains a two-year limitation period on tracing actions to recover dissipated matrimonial property. In the Commission's opinion, the transferee in such a case is in much the same position as a constructive trustee who has acquired property by fraud. No limitation applies in such a case.

Recommendation 11

(1) Dissipation should be defined as an extravagant or wasteful dealing with matrimonial property by a spouse without the consent of the other spouse.

(2) No limitation period should apply to the tracing of matrimonial property gifted to a third party who knew or ought to have known that the gift was made with intent to defeat a matrimonial property claim.

(v) *Distribution after Death of a Spouse*

Because matrimonial property legislation is based on the idea of deferred sharing, it does not create any new property rights until an order distributing matrimonial property is made. But the legislation is also premised on the idea that the joint contributions of the spouses during marriage entitles each to a share in the assets acquired during marriage. This entitlement should not be extinguished on the death of the spouse with title to the property. The Commission rejects the approach of those provinces where the right to apply for distribution lapses on the death of a spouse.[34]

The Saskatchewan *Matrimonial Property Act* allows a surviving spouse to bring an application for distribution of matrimonial property after the death of the other spouse. Some problems relating to the interaction between matrimonial property legislation and the entitlement of a surviving spouse under a will, under *The Intestate Succession Act*[35], and under *The Dependants' Relief Act*[36] remain, however.

Under the present *Matrimonial Property Act*, where the deceased spouse has left a will, a court distributing matrimonial property has a discretion to take into account any entitlement of the surviving spouse under the will.[37] Presumably, entitlement under the will would be a ground for distributing to the surviving spouse less than an equal share of the remaining property. But the Act provides no guidance as to how the discretion should be exercised. If there is no will, the Act expressly provides that any amount received by the surviving spouse under *The Intestate Succession Act* should not be taken into consideration.[38]

In the Commission's opinion, the intention of the deceased spouse ought to be taken into

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[34] In British Columbia, Ontario and Prince Edward Island, no post-death distribution is possible, and in Alberta and Manitoba an application may be maintained only if a "triggering event" such as divorce or separation has occurred prior to death.

[35] R.S.S. 1978, c.I-13.

[36] R.S.S. 1978, c. D-25.

[37] Section 21(2)(l).

[38] Section 30(3).

consideration. It should not be presumed that the deceased intended the surviving spouse to take the whole estate by the combined operation of the will or *The Intestate Succession Act* and *The Matrimonial Property Act*. The usual expectation of a testator is that on death all property will be distributed in accordance with the will. Rarely would a person making a will reduce a spouse's share in contemplation that a matrimonial property application might be made. Similarly, if a spouse has failed to make a will after a separation, it would be unlikely that the spouse would intend the other spouse to take both a share under the will and another share under *The Matrimonial Property Act*. It should be presumed that the will recognizes the surviving spouse's rights under *The Matrimonial Property Act*, and is intended to distribute the matrimonial property. On the other hand, regardless of the intention of the deceased spouse, the surviving spouse is at least entitled to the share of property that would be ordered under *The Matrimonial Property Act*, because that property has been earned by the spouse through contributions to the marriage. Therefore, a surviving spouse's claim to matrimonial property should be reduced by the spouse's entitlement under the will.

Recommendation 12

When an application is made for distribution of matrimonial property after the death of a spouse, unless a contrary intention appears from the will of the deceased spouse, the entitlement of the surviving spouse to matrimonial property owned by the deceased spouse should be reduced by the entitlement of the surviving spouse under the will or under *The Intestate Succession Act*.

The Dependants' Relief Act is based primarily on maintenance considerations. There is no reason why an order under *The Dependants' Relief Act* could not be supplementary to an order for distribution of matrimonial property. However, the Act provides that if an allowance is awarded to a surviving spouse, it must be at least the amount he or she would have received had the other spouse died intestate.[39] This provision appears to be a method of dividing property between spouses, rather than purely a matter of maintenance. It no longer has any useful role to play since the enactment of matrimonial property legislation.

Recommendation 13

The Dependants' Relief Act should be amended to remove the rule that if an allowance is awarded to a spouse, it must be at least the amount he or she would have received upon an intestacy.

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[39] *Supra*, footnote 36, s. 9(2) as amended by S.S. 1984-85, c. 41, s. 10.

SUMMARY OF RECOMMENDATIONS

Recommendation 1

Property acquired during marriage should be subject to equal division between spouses. The court should have a structured discretion to depart from equal division where it would be fair and equitable to do so, but the relative contributions of the spouses should not be a factor for the court to consider.

Recommendation 2

The court should have a discretion to depart from equal division of matrimonial property where there has been a wilful and nearly total refusal to contribute to the marriage, except where there is a reasonable excuse for the absence of contribution.

Recommendation 3

(1) The value of property owned by either spouse at the date of marriage should be exempt from distribution.

(2) Any increase in the value of property brought into marriage that results from an improvement to the property made by either spouse should ordinarily be subject to equal division between the spouses.

(3) Any increase in the value of property brought into marriage that is not the result of an improvement to the property should ordinarily be exempt from division, except in the case of a long marriage where both spouses have made a contribution to the maintenance, preservation, or management of the property. The court should have a discretion to increase or decrease the exemption in appropriate cases.

Recommendation 4

Gifts or inheritances received by a spouse during marriage should be presumed to be exempt from division. The presumption should be rebuttable, however, if it is shown that the gift or inheritance was intended for both spouses.

Recommendation 5

The matrimonial home should be given special status when matrimonial property is divided. Equal division of the home should be departed from only in exceptional circumstances, and when the home has been brought into marriage by one of the spouses the exemption should be limited to the value of the home at the date of marriage, less the value of any encumbrance on it.

Recommendation 6

The Homesteads Act should be repealed and replaced with a provision in matrimonial property legislation requiring consent of both spouses to sale or encumbrance of the matrimonial home.

Recommendation 7

Matrimonial home should be defined as the residence the spouses regarded as their last principal place of cohabitation, and should include only that portion of the surrounding land that may reasonably be regarded as necessary for the use and enjoyment of the residence.

Recommendation 8

Where spouses are not cohabiting when an application for division of matrimonial property is brought, the property should be valued for purposes of division as of the date of separation. The court should make appropriate adjustments to take into account the use of, benefit from, and any increase or decrease in the value of matrimonial property between the date of valuation and the date of the order.

Recommendation 9

Where distribution of matrimonial property used for business or farming purposes would impair the viability of a business or farm and where the use of such property is essential to enable a spouse to earn a living, the court should have a discretion to defer distribution unless it would be unfair or impractical to do so. The court should structure the deferral in such a manner as to ensure that the spouse whose share is deferred is adequately compensated, through payment of interest or otherwise.

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